Rondout Electric, Inc. *and* International Brotherhood of Electrical Workers, Local Union 363, AFL–CIO. Cases 3–CA–18643, 3–CA–18950, and 3–CA–19567

November 8, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

On December 5, 1996, Administrative Law Judge Howard Edelman issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs[1] and the Respondent filed a brief in answer to the exceptions of the General Counsel and Charging Party.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

In so doing, we note the following:

(1) We agree with the judge's finding that the Respondent's state court criminal trespass charges against union organizers John Sager and Stephen Rockafellow were not a violation of the Act. However, we do not agree with the judge's analysis. The judge cited the following evidence. On September 12, 1994,[4] nonemployee union organizers John Sager and Stephen Rockafellow entered the Respondent's office trailer at the jobsite. Sager took a photograph of an antiunion poster.[5] The Respondent did not invite Sager and Rockafellow to do this. In October, the Respondent filed criminal trespass charges against Sager and Rockafellow concerning this incident. In March 1995, the state court dismissed these charges because they relied on the wrong statutory provision.[6] The state court held no hearing on the merits of the charges.

The judge concluded that in order to establish a violation of the NLRA based on a state court lawsuit, the General Counsel must show that a respondent filed a meritless state court lawsuit with a retaliatory motive.[7] The judge found that the Respondent's charges against Sager and Rockafellow were not shown to be meritless. He noted that the state court dismissed the charges because of erroneous statutory citations. He also found that the testimony of Sager and Rockafellow indicated that they had trespassed. Finally, the judge found that the Respondent's charges were not filed with a motive to retaliate against the Union's organizational activities.[8]

We disagree with the judge's analysis. The Board has held that where a state court lawsuit has finally been adjudicated and the plaintiff has not prevailed, the state suit is deemed meritless for purposes of a *Bill Johnson's* analysis.[9] In discussing this finding of lack of merit, the Supreme Court in *Bill Johnson's* alluded not only to adverse judgments, but also to suit withdrawals and occurrences that "otherwise" manifest a lack of merit.[10] Here, the state court dismissed the Respondent's trespass charges. The court did so because there was no cause of action under the cited state statute on which the state court suit was based. There is no record of an appeal or of a lawsuit amendment relying on a different statute. Accordingly, that lawsuit is over, and plaintiff lost.[11]

However, we agree with the judge's finding that the Respondent's criminal charges did not have a retaliatory motive. In the criminal trespass "informations" filed against Sager and Rockafellow, the Respondent only cited trespass in the job trailer with respect to both Sager and Rockafellow, and "tak[ing] a picture of the interior" with respect to Rockafellow.[12] The Respondent did not attack Sager's and Rockafellow's other access to the Respondent's employees on the jobsite. The Respondent's attorney noted this access on the record and Sager himself testified that on September 12 he went to the construction building on the jobsite where he spoke with the

[1] The General Counsel also renewed his motion, contained in the General Counsel's brief to the administrative law judge, to correct minor transcript errors. The administrative law judge inadvertently failed to grant this motion. We do so.

[Certain errors in the transcript are noted and corrected.]

[2] The judge dismissed the complaint allegations, relying almost entirely on his credibility findings. The General Counsel and the Charging Party have excepted to the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We agree with the judge's finding that the Respondent's general manager, Ed Pietrowski, did not unlawfully interrogate applicant Chris Gallo at his prehire interview in May 1994, based on the judge's discrediting of Gallo's testimony concerning the incident. We find it unnecessary to address the judge's further comments regarding the lawfulness of Pietrowski's inquiries.

[4] All dates are in 1994 unless otherwise indicated.

[5] The record does not support the judge's additional finding that Sager took an antiunion flier.

[6] The charges relied on a statute concerning "a dwelling."

[7] The judge relied on *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731 (1983).

[8] The judge provided no analysis for the latter finding.

[9] *Braun Electric Co*., 324 NLRB 1 (1997); *Control Services,* 315 NLRB 431, 455–456 (1994), and cases cited.

[10] *Bill Johnson's Restaurants v. NLRB*, supra at 747.

[11] The Respondent contends that its criminal charges had merit and the state court's dismissal for erroneous statutory citation was based on "mere technicalities." Even if we were to find that Respondent's criminal charges were not meritless, that would not affect the result in this case. As discussed, our basis for dismissal is that there is no proof that the criminal charges were filed for a retaliatory motive.

[12] Rockafellow testified that it was Sager who took the photograph of the antiunion poster.

Respondent's employees for 15 to 20 minutes.[13] Given the Respondent's clear toleration of workplace organizing, we cannot conclude that it filed criminal charges to retaliate against protected activity. Rather, it retaliated against the unwarranted intrusion by Sager and Rockafellow. The two men entered the Respondent's trailer together and one or the other proceeded to photograph a Respondent document. This led the Respondent to file criminal charges. There was no retaliation against protected activity as required for a violation.[14]

(2) We also agree with the judge, for the reasons he states, that the General Counsel failed to establish that the Respondent refused to hire the 11 named applicants because of their affiliation with the Union. The judge found that the Respondent's hiring and failure to fire were pursuant to its "ordinary and lawful policies." Thus the Respondent gave preference to its former employees, to employees who had worked for the brother of the Respondent's owner, and employees who filled a hiring need and were immediately available. In addition to the reasoning of the judge, we rely on the following:

(a) William Miller

The judge found that the Respondent hired William Miller because he filled a hiring need and was immediately available. The judge credited General Manager Kenneth Schupp's testimony concerning the events of June 22. John Harris, one of Schupp's foremen, telephoned Schupp about needing a worker. When Schupp went downstairs, his secretary told him that William Miller was filling out an application and would like to talk to someone. Schupp spoke with Miller for about 10 minutes and was impressed with his work experience and enthusiasm for hard work. Schupp testified that hiring Miller on the spot was preferable to a delay of 2 or 3 days spent checking files and setting up interviews.

The General Counsel alleges that Miller, however, did not work until June 27, and that this delay discredits the validity of Miller's hire as "filling a hiring need and immediately available." The General Counsel also notes that Miller commenced work on the day after the Respondent's June 26 notification to the 11-named applicants alleged as discriminatees that the Respondent would not be offering them employment at that time but would keep their applications on file for a year. The General Counsel therefore alleges that Miller's hire shows a discriminatory motive as to the eleven.

We disagree. The record is not precise about the immediacy of Harris' need for a worker. In any event, Miller was immediately available on the day that Schupp received the phone call establishing the need to hire and hired Miller. Thus we find that the Respondent hired Miller pursuant to the Respondent's established "ordinary and lawful" practice of hiring employees who filled a need and were immediately available. Furthermore, the day on which Schupp hired Miller preceded by a few days the date of the Respondent's notification to the 11 applicants alleged as discriminatees that the Respondent's hiring needs were currently satisfied. Accordingly, the circumstances of Miller's hire fail to establish discrimination. This is especially so where, as here, there is no evidence of animus.

(b) Ed Barber and Adam Cooper

The judge also credited Schupp's testimony concerning the Respondent's rejection of Ed Barber for a foreman position and its hiring of Adam Cooper as a helper. Barber applied for a foreman position. The Respondent sought only electricians and helpers. There were no foreman positions available. The Respondent also preferred not to substitute a journeyman electrician position for a foreman position because of the significant difference between the two positions. Moreover, the Respondent regularly rejected applicants for electrician positions who had not recently worked in the trade. Barber had not worked as an electrician for several years. Cooper applied for an electrician position. The Respondent hired him as a helper because his qualifications matched those required of a helper.

The General Counsel alleges that the Respondent's failure to hire Barber as an electrician was discriminatory as demonstrated by the fact that the Respondent hired Cooper as a helper.

We disagree. The judge correctly found that the Respondent refused to hire Barber as a foreman and hired Cooper as a helper for valid reasons. By contrast, the General Counsel's allegation of discrimination rests on two assumptions: the first is that there is some sort of equivalency between substituting electrician for foreman and helper for electrician; the second is that the Respondent should have made the former substitution for Barber because the Respondent made the latter substitution for Cooper. We find that these assumptions are not supported by evidence. Thus they do not establish a basis for finding discrimination. We also note that there is no evidence showing animus.

(c) John Malkin

The judge credited Schupp's testimony that the Respondent hired Malkin on June 21 as a former employee and an employee who had worked for the brother of the Respondent's owner. The General Counsel alleges that Malkin was not a former employee of the Respondent

[13] Sager also testified that in July, August, and September he visited the Respondent's jobsites, speaking to employees there, leaving his business card, and answering phone calls from employees in the evenings.

[14] In Member Hurtgen's view, the suit against Sager and Rockafellow would be lawful even if Respondent-plaintiff had alleged only trespass onto Respondent-plaintiff's property. Under *Lechmere*, 502 U.S. 527 (1992), they had no protected right to trespass, and thus the suit would not be aimed at protected activity.

and that the Respondent's preference for Malkin over the 11 specified applicants was discriminatory.

We disagree. Even assuming that Malkin was not a former employee of the Respondent, the Respondent lawfully gave Malkin preference over the 11 applicants alleged as discriminatees as a former employee of the brother of the Respondent's owner.

(d) Warren Belmore

The judge credited Schupp's testimony that Warren Belmore was hired on August 7 on referral from one of the Respondent's employees and the brother of the Respondent's owner. The General Counsel alleges that Belmore filled out his application for employment on June 31, was hired on July 5 and rehired on August 7, all after the June 26 notification to the 11 applicants alleged as discriminatees that the Respondent's hiring needs were currently satisfied. The General Counsel further alleges that the Respondent's preference for Belmore was discriminatory.

We disagree. We find no evidence of discrimination, even assuming the accuracy of the chronology presented by the General Counsel. Belmore was referred by the brother of the Respondent's owner. As the judge found, and we agree, the Respondent used ordinary and lawful hiring practices which included preference for employees who were referred by the brother of the Respondent's owner. As just such an applicant, Belmore had preference over the 11 applicants alleged as discriminatees irrespective of the date of his application or hire, and irrespective of whether these dates were before or after June 26. The General Counsel provides no evidence of discrimination here.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Robert A. Ellison, Esq., for the General Counsel.
Thomas V. Walsh, Esq. (Jackson, Lewis, Schnitzler & Krupman), and *Patricia Wager, Esq. (Lewis & Greer, P.C.),* for the Respondent.
Robert M. Archer, Esq. (Meyer, Suozzi, English & Klein, P.C.), for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD EDELMAN**,** Administrative Law Judge**.** This was tried before me on April 29 and 30 and May 1 and 2, 1996, in Poughkeepsie, New York. The various charges in this case were filed by International Brotherhood of Electrical Workers, Local Union 363, AFL–CIO (Local 363 or the Union) against Rondout Electric, Inc. (Rondout or the Company). On October 6, 1995, a consolidated complaint issued, alleging violations of Section 8(a)(1) and (3) of the Act.

On the entire record in this case, including my observation of the demeanor of the witnesses, and a consideration of briefs filed by the counsel for General Counsel, counsel for Local 363, and counsel for Rondout, I make the following

FINDINGS OF FACT

Rondout is a New York State corporation with the principal office and place of business located in the city of Poughkeepsie, New York, where it is engaged in the electrical contracting business in the building and construction industry. Rondout annually, in conducting its business provides electrical contracting services within the State of New York for enterprises, which are directly engaged in interstate commerce.

It is admitted, and I find that Rondout is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

It is also admitted, and I find Local 363 is a labor organization within the meaning of Section 2(5) of the Act.

As set forth above, Rondout is in the business of providing electrical contracting services. Rondout is owned by its president, Wilbur (Bill) Whitman. Whitman and his brother, Sandy, previously owned and operated another electrical contracting company, Whitman Electric, in Kingston, New York. The brothers split amicably in 1969, when Wilbur founded Rondout Electric in nearby Poughkeepsie, New York. Whitman Electric is still owned and operated by Sandy Whitman and his sons.

Rondout conducts business at jobsites throughout New York State and Florida. Its principal office is in Poughkeepsie, New York.

Rondout's Florida business increased substantially throughout 1994 and began to demand more and more of Bill Whitman's time. Whitman tried to continue managing the day-to-day business of both offices with the help of his general managers in Poughkeepsie, Ed Pietrowski and Jim Decker. Towards the end of 1994, Whitman's time began to be dominated more and more by his Florida business. By the beginning of 1995, Whitman moved to Florida, and left the management of the Company's New York operations to Pietrowski and Decker. However, in early February 1995 Pietrowski and Decker left Rondout suddenly, and under less than favorable circumstances.

In February 1995, the day-to-day running of Rondout became the responsibility of Kenneth Schupp. Schupp was originally employed by Whitman Electric as an electrician, in 1982. Upon layoff from Whitman in 1984, he was referred by Sandy Whitman to Rondout. He was hired by Rondout as an electrician, was promoted to foreman, and was later to superintendent. At the time Schupp became general manager, he had served 8 years as Rondout's superintendent at a major jobsite at the Rockland Psychiatric Center in Rockland, New York. With the increased demands on Bill Whitman's time by the Florida offices, it as agreed that Schupp would take over the daily operations of Rondout in Poughkeepsie. Schupp has been solely responsible for all hiring decisions at Rondout, since February 1995.

The Rondout "shop" in Poughkeepsie is a two-story structure housing the offices of 15 employees. Schupp, the general manager, is in overall change of the Poughkeepsie operation. In addition there is a controller, project managers, and estimators, an accounting staff, and two secretaries. The building has a small lobby area, which is open to the public, with a window looking into the receptionists office. In addition to directly supervising the office staff, Schupp spends about 30 percent of his time on the road visiting clients and worksites. Both office staff and onsite staff report to Schupp, either directly or indirectly. No electricians work in the building although they are occasionally helpers in the building to run materials back and forth to sites.

At each worksite, Rondout employs various numbers of foremen, electricians, apprentices, helpers, and laborers. Each Rondout worksite has a foreman. The General Counsel contends that the "foremen" are employees within the meaning of Section 2(3) of the Act. However, the General Counsel contends that Respondent's foreman, Jim Snell, is a supervisor within the meaning of Section 2(11) of the Act. The credible evidence established that all Rondout's foremen, including Snell are hourly paid. The foremen generally sets up manpower for the day, consults the work plans provided by the Company or by the clients, and will usually assign work to electricians, helpers, and other employees. Such work assignments are usually routine.

Foremen, including Snell, have no authority to issue discipline, to grant time off, or to hire or lay off employees. Only Schupp has the authority to exercise these functions. Schupp occasionally asks foremen to be his eyes and ears on the site and to discuss site problems with the office.

Rondout employs electricians in one job category or title: electrician. Rondout does not use "mechanic" or "journeyman" titles. To be considered for employment by Rondout as an electrician, an individual must posses the knowledge and ability to, inter alia, run conduit on his own, control work, work in load centers, and do major power distributions. An individual whose skills fall one step short of these requirements is not considered to be an electrician and would not be hired as such.

Rondout conducts a New York State certified apprenticeship program. The Company employs numerous new electricians in this manner. In this program, Rondout hires individuals who commit to participation in a 5-year academic program, attending classes at night, while employed in electrical field work for Rondout during the day.

Rondout also employs approximately 10 or 11 "helpers." Helpers are *not* electricians. It is their job to work with electricians by carrying materials, assisting as an extra hand, and "getting coffee." They have no qualifications as electricians.

The credible testimony of Schupp[1] establishes that Rondout Electric has a long established set of policies and practices with regard to hiring and recruitment.of employees. These practices, in order of their priority, are:

1. Rehiring former Rondout employees.
2. Hiring former Whitman Electric employees.
3. Referrals from current Rondout employees.
4. Hiring from newspaper ads

Employment in the electrical contracting industry is seasonal. Summer is the peak season. It has been Rondout's policy "forever" to seek the rehire former company employees first. The reason for preference number 1 is obvious, the Company has already had successful experience with the employee.[2]

However, Rondout has no "seniority system" for recall or rehire. Rondout keeps track of its previous employees by referring to their personnel records filed in the inactive personnel files. The files are listed alphabetically, not chronologically.

Each personnel file includes a folder, which indicates the name of the former employee, his job title, address, wage rate, and his dates of employment. When reviewing former employees' files for reemployment, Rondout sorts through the file cabinets. Because this method is imperfect, many former employees can be missed through misfiling, or because their addresses have changed. Therefore, at times Rondout has run newspaper ads seeking applicants as a way of letting former employees know that work is available. In this way, the former employees find Rondout, instead of Rondout looking for its former hires.

As stated above, the Whitman brothers, Bill and Sandy, separated their business relationship amicably. From time to time over the years, when Sandy (Whitman Electric) has laid off employees, he has called Bill (Rondout Electric) to see if Rondout needed help. In this manner, Sandy assisted his brother, and also found continued work for his employees. Because of the relationship, Rondout Electric has established a practice of giving an employment preference to former employees of Whitman Electric when its' own former employees cannot fill the open jobs. Employees of Whitman Electric have been represented by a union, although not Local 363.

According to Schupp's credible testimony, hiring former Rondout or Whitman employees has generally covered all of Rondout's hiring needs. Additional hiring needs are filled by referrals received by the Company from other employees, and from other employers. In the event these hiring methods do not fill their hiring needs, the Company will consider applications from qualified members of the public, either solicited by newspaper ads, or received by Rondout, unsolicited. Schupp testified that a receptionist keeps a file of a current month's applications, whether solicited by advertisement or unsolicited, for his periodic review.

Schupp's testimony as to Rondout's hiring practices are logical. They appear to me, to be sound business practice. Moreover, Schupp's credible testimony as to Rondout's hiring practices is entirely unrebutted.

The General Counsel contends that Rondout unlawfully interrogated Chris Gallo during Gallo's prehire interview in May 1994. It is claimed by the General Counsel that Ed Pietrowski, at the time the general manager, examined Gallo's application, and inquired as to Gallo's earlier work for unionized employers. According to Gallo's testimony, which I do not credit, Pietrowski allegedly inquired whether Gallo was a member of Local 363. Gallo was previously employed—as a union member—by Whitman Electric. Notwithstanding his prior union membership, Gallo was hired by Pietrowski.

This constututes the extent of the allegation of "interrogation" by Pietrowski. Even if I were to credit Gallo, which I do not, as a matter of law, these alleged facts are insufficient to establish a violation of the Act. It is well established that mere inquiries are not unlawful. In order to constitute a violation of

[1] I conclude that Schupp is an entirely credible witness. On a scale of 1 to 100, I would rate him 100. Throughout his long testimony including intense cross-examination he was entirely composed. He answered every question put to him in a direct and thoughtful manner. His answer to all questions was complete and detailed. He did not fence with counsel, nor was he evasive with respect to any question put to him. His testimony to questions put to him by counsel as to why he did not hire each of the alleged discriminatees were detailed, logical and unrebutted. Similarly, his testimony as to questions why he hired other employees during the hiring period of June through July 1995 were also direct, logical, detailed, and unrebutted. I credit his entire testimony.

[2] Conversely, former employees who left employment under inappropriate circumstances, such as resigning without notice, or discharge for cause, are not considered eligible for rehire.

the Act, an "interrogation" into protected conduct must be coercive. *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). Where the nature of the questioning is open, general, and nonthreatening, it is *not* a violation. *Sunnyvale Medical Clinic,* 277 NLRB 1217–1218 (1985). Accordingly I find that Rondout did not violate Section 8(a)(1) as alleged.

The General Counsel similarly alleges that Pietrowski interrogated employee Andy Karadontes about his union affiliation, during Karadontes' interview with Rondout in June 1994.

The *sole* allegation of this 8(a)(1) violation is based on Karadontes' testimony that during his job interview with Rondout on or about June 16, 1994, Pietrowski asked him "if he belonged to any union organization."

On cross-examination, Karadontes was questioned about the affidavit he provided to the Region in support of this complaint. The affadavit taken by a board agent, only a few days after the alleged "interrogation" contained contradictive testimony to his direct examination. Karadontes, when confronted by counsel for Rondout during cross-examination admitted that his affidavit stated that Pietrowski only asked him whether he belonged to "any organizations." Such testimony is totally contradictory to his direct testimony where he accused Pietrowski of asking him "if he belonged to any union organizations." I find such significant contradiction renders Karadontes entire testimony incredible.

On the basis of my credibility resolution concerning Karadontes, I conclude the General Counsel has not established that Rondout violated Section 8(a)(1) as alleged.

Gallo was a Rondout employee for exactly 4 weeks, from May 16 to June 10, 1994. Initially, Gallo spent 2 days on a Wal-Mart project in Newburgh, New York, installing conduit and dividing circuits. Thereafter, beginning May 18, he and another employee, Charlie Jones, were assigned to prepare a Home Depot site in Middletown, New York, for the larger Rondout crew, which was scheduled to start in June.

Gallo was specifically given the assignment because of the skill he had claimed, during his prehire interview, for drawing layouts.

Gallo testified on direct that, from the outset of his employment with Rondout, he had no trouble completing his assigned work. He specifically denied that Pietrowski had ever discussed his work performance with him. He testified that nothing had even made him think that he was in danger of receiving a disciplinary notice. However, he had no choice but to *admit the truth* when confronted on cross-examination with his affidavit, which said exactly the opposite, that Pietrowski "was constantly telling me I wasn't doing the work fast enough and what was the problem."

Indeed, Gallo's affidavit expressed that he knew Pietrowski was thoroughly displeased with his work. Gallo said in his affidavit that Pietrowski felt that he "never did anything—no matter what you did it wasn't good enough, it wasn't fast enough."

On May 20, after encountering continued difficulty satisfying the Company's work requirements, Gallo contacted Local 363 Organizer John Sager, and signed an authorization card.

Gallo did not discuss his Local 363 activity with another employee of Rondout until June 9 at the earliest. During the interviewing time, Gallo's work continued to deteriorate.

On Monday, June 6, Ed Pietrowski specifically told Gallo that he was expecting technical drawings of an electrical room which Gallo had not yet completed. Gallo admitted, when confronted with his affidavit that Pietrowski told him his work "*was not good enough*" on that day. On June 7, Pietrowski directed Gallo to contact him daily regarding his job performance. However, Gallo did not call him. Gallo then testified on cross-examination when, again confronted with his affidavit that on June 8, Pietrowski reviewed Gallo's technical drawing, but was still not satisfied.

On June 9, 1994, when Gallo was certain that his job was at risk because of the poor performance, he decided to advertise his Local 363 interests. Gallo testified that on that day he wore Local 363 T-shirt, and during the break he discussed the Local 363 with Rondout employees and handed out authorization cards.

In the afternoon on June 9, Gallo testified he was approached by Foreman Jim Snell. Snell was handing out paychecks. Snell allegedly held in his hand an IBEW authorization card. Snell allegedly told Gallo that Rondout wants nothing to do with Local 363 and they're not going to put up with this kind of conduct. With that, Snell "walked away." In view of the significant contradictions between his direct testimony and cross-examination, and his affidavit, I conclude Gallo is an incredible witness. I do not credit his testimony as to his alleged conversations with Snell.

Counsel for the General Counsel contends that Snell, although "foreman" was also a supervisor under Section 2(11) of the Act.[3]

The party seeking to assert an individual's supervisory status has the burden of proof. St. *Alphonsus Hospital*, 261 NLRB 620, 624 (1982), enfd. 703 F.2d 577 (9th Cir. 1983).

Under Section 2(11), an individual is a supervisor if he or she

> has authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them or to adjust their grievances, on effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The record contains no evidence whatsoever that Jim Snell had the requisite authority to make him a supervisor within the meaning of the Act. In fact, all the affirmative evidence on this subject demonstrates conclusively that. Snell was not a supervisor under the Act. Jim Snell had no authority to hire or fire, nor to lay off employees, he did not responsibly direct employees in any but routine work, he had no authority to grant time off, or to take disciplinary action. Moreover, Foreman Snell had no greater authority than any other employee to recommend any changes in terms and conditions of employment.

The record is further silent as to any ability of Foreman Snell to adjust grievances, reward, transfer, promote or demote employees, grant overtime, or in any way affect changes in employees' terms and conditions of employment. On this record, it is conclusive, and I find that Snell is an "employee"—and not a "supervisor"—within the meaning of the Act.

Absent such supervisory status on the part of Snell, his alleged statements to Gallo, even if true, cannot be imputed to Rondout. Moreover, Gallo's contention of "interrogation" by Snell are simply not made out on the record. The record estab-

[3] Neither Rondout nor the General Counsel called Snell as a witness.

lishes that Snell handed Gallo a union authorization card which Gallo admitted handing out earlier that day, and asked him if he knew what it was. There is no alleged "interrogation," coercive or otherwise. Further, on this record, it is abundantly clear that Snell's alleged comments as to the Rondout's displeasure with union organizing are no more than an expression of opinion. Indeed, according to Gallo, Snell said he wanted nothing to do with a union.

The record is clear that Rondout discharged employee Gallo, because it was dissatisfied with his work performance. This is clear from witness Gallo's own testimony, and from the documentary evidence. Moreover, the General Counsel failed to show directly or indirectly, that Rondout was motivated in any way by any intent or desire to retaliate against Gallo because of his activities on behalf of Local 363.

It is also clear that Rondout was dissatisfied with Gallo's work performance from that time he was hired. It is also clear that Gallo did not tell his coworkers about his Local 363 activity until June 9—and indeed, he *never* told management. The General Counsel failed to show that Rondout was even aware of Gallo's allegedly prounion stance at any time prior to his discharge.[4]

Gallo testified that on June 10, 1994, he spoke with Ed Pietrowski by telephone. According to Gallo, Pietrowski "started complaining and saying I'm not working out, this not going to work out." His criticisms, by Gallo's own testimony, were about Gallo's work performance. Pietrowski amiably accommodated Gallo's request to finish the workday, but terminated his employment at the conclusion of that day.

Pietrowski subsequently gave Gallo a warning letter dated June 7. The warning letter expressed Rondout's dissatisfaction with his failure to apply himself to his work assignments, failure to report daily to Pietrowski as ordered, failure to lay out the electricial room properly, and a general lack of the knowledge Gallo claimed he had, during his employment interview as to his ability to draw layout.

Upon Gallo's discharge he received a termination letter stating he was terminated for lack of experience, failure to follow directions, and generally an unacceptable work performance.

In a case such as this one, where the General Counsel relies exclusively on the uncorroborated testimony of a single interested witness, the witness' credibility must be a determinative factor. Unfortunately, Gallo was an incredible witness.

As described above, Gallo's affidavits stated that he knew Pietrowski was thoroughly displeased with his work.

In addition, Gallo testified on direct that, prior to being terminated he had never heard any complaints about his work. However, on cross he admitted—again when faced with an inconsistent affidavit—that he received *three* complaints during the week of June 6th alone. On June 6, Pietrowski told him that his layout was not good enough. Gallo then received further criticism of his work 2 days later. Gallo even agreed at trial that his work was incomplete.

The only reasonable interpretation of Gallo's testimony is that he would say anything to support his charge. Accordingly, I only credit his admissions against his own interest, which were literally dragged out of him on cross-examination.

The General Counsel seems to rely solely on the timing of the discharge; the day after Gallo informed coworkers of his Local 363 affiliation. There is no evidence that Rondout had any knowledge of Gallo's Local 363 activity. On the other hand there is ample evidence that Gallo had serious work deficiencies. Accordingly, I conclude that the General Counsel has failed to establish that Gallo's union activities were a motivating factor leading to his discharge, and I conclude that Gallo was not discharged by Rondout in violation of Section 8(a)(1) and (3) of the Act.

On September 12, 1994, John Sager and Stephen Rockafellow, nonemployee Local 363 organizers, entered Rondout's office trailer, an extension or its' office at a jobsite. It is uncontroverted that the two men entered the Rondout job trailer without invitation by any "supervisory" employee and proceeded to photograph Rondout documents inside the trailer. At one point, Sager ripped off an antiunion flier from the trailer wall.

When Rondout's general manager, Pietrowski, became aware of such action, he filed criminal trespass charges. The police inadvertently listed the statute for trespass on a *residence* rather than on a business. (See GC Exhs. 35 & 37 listing Penal Law Sec. 140.15 "when he knowingly enters or remains unlawfully in a dwelling"; and GC Exh. 39 in which counsel argues that the trailer is not a dwelling.) Pietrowski then left the Company during the prosecution of the charges without informing anyone of the status of the charges. The charges were dismissed, not on the *merits*, but for the technical error in the statutory citation.

The General Counsel contends that the filing of such criminal charges is a violation of Section 8(a)(1) under the theory of *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), wherein the Supreme Court held that it is an unfair labor practice to prosecute a baseless lawsuit with the intent of retaliating against an employee, a labor organization, because of its union activities concerning the employer who prosecutes such charge.

While the Act prohibits interference with an individual's participation in concerted activity, it does not in any way insulate union officials from appropriate prosecution for unlawful activity. Nor does it bestow on a union official the right to invade another's privacy under color of some unspecified "union right." The General Counsel's complaint erroneously states that there was no reasonable basis in law and fact for a trespass charge under the facts here. The admitted acts of Sager and Rockafellow belie such claim.

Rockafellow and Sager admittedly trespassed in the trailer. Sager testified that he and Rockafellow saw a person enter the trailer and simply followed him in. They neither asked nor received permission to enter the trailer, which they knew to be the property of Rondout. Sager admitted that while inside they took photographs, and ripped off a antiunion flier

I conclude such lawsuit was not filed to retaliate against Local 363's organization activities.

The General Counsel appears to argue that a construction trailer is a public place and that absent specific direction to the contrary or a request to leave, anyone may enter a contractor's trailer and help themselves to the contractor's documents. See testimony of Rockafellow, claiming industry practice allows entry by the public. This argument is absurd. A trailer on a jobsite is an extension of a contractor's office and is entitled to the same protection. Important papers and sometimes money are in such trailers. It is clear that a construction trailer, unlike a jobsite, is not a public place.

In any event I find no violation of the Act by Rondout filing of such criminal charge.

[4] The General Counsel failed to call. Ed Pietrowski and a James Snell—on this issue.

The General Counsel alleges that Rondout refused to hire or refused to consider for hire 11 applicants, because of their Local 363 affiliation.

After General Manager Pietrowski suddenly left Rondout in late February 1995, Schupp, newly returned from his post at the Rockland Psychiatric Center, took over. Schupp inherited not only the numerous responsibilities which had always belonged to the general manager, but also the duties left by the absence of Bill Whitman, who had moved to the Company's Florida operation.

Among the numerous projects Schupp had to undertake was the hiring of an adequate staff of qualified personnel. Schupp utilized the same practices he had seen the Company use over the years he was employed. He knew that Rondout repeatedly hired back its former employees. He knew that there might be referrals from Whitman Electric, which was in fact how he got his own job.

Schupp began to employ these methods immediately. During February to May 1995, Schupp hired numerous individuals, through the use of the Company's traditional hiring practices. For example, in February 1995, Schupp reviewed the files to contact and hire an electrician, Dennis Borne, with whom he had worked at Rondout's Rockland Psychiatric site, but had not been called back to work. In March, he contacted another former employee electrician, John Hanes whose work he recalled as being good. Two former employees, Jeff Heek and Charlie Jones, contacted him to request work, one a graduate of Rondout's apprenticeship program, the other a semiretired former employee who regularly worked in the spring and summer.

In May 1995, Schupp hired five former employees, including four electricians and a helper. Of the five electricians, one, David LaFay, contacted Schupp after living outside the area for some time. Another, Gary Kuzminski, graduate of Rondout's apprenticeship program asked for rehire after an illness. Two others, Tom Morris and Troy Mackey, were friends of Schupp, with whose work he was familiar and respected. The helper Michael Kuftack, was a former Rondout apprentice who quit the apprenticeship program long before finishing it, and now was qualified for work as a helper.

In all this instances, Rondout utilized its preference for former employees, for those of Whitman Electric, and for referrals, long before it received the applications from the alleged discriminatees. There is no evidence to dispute this.

Traditionally, the busy season for the Company is June to September. Schupp knew that he would need to hire additional employees in June. However, with outstanding bids, an unknown number of returning workers, and uncertain program schedules at his on-going projects he did not know how many he would need.

In June 1995, Schupp determined that he would protect the Company by building up an applicant base for electrician and helpers. He also knew from the office personnel that the Company had, from time to time, run ads in various newspapers. These advertisements had produced both original applications and familiar names of Rondout employees who had fallen out of touch.

For 3 weeks in June 1995, Rondout ran newspaper advertisements for electricians and helpers, changing the ad each week. The ads were drafted by Schupp's secretary, based on previously run advertisements. The first week Schupp included Rondout's name and invited applicants to apply at the office. This caused stress for the office staff who was hard pressed to explain Schupp's limited availability, since he was the only person authorized to interview candidates. The second ad therefore listed an anonymous post office box and requested resumes from interested applicants. Rondout received far fewer responses, leading them to believe that applicants were unwilling to expend the energy of resume send to an unknown employer. Therefore, in the third week, the ad simply requested a telephone message to a voice mail box explaining the applicant's qualifications. While the ad ran, Rondout received no responses to the phone line.

Schupp was very busy during the first week of June. He utilized the time while the first was running during their week of June 5 to pull records of potential rehires from the Rondout inactive employee file. When reviewing these files, Schupp used the same criteria he used in his searches before. He took these files and piled them on his desk, for further review and potential contact.

Meanwhile, applicants and resumes were being received by the Company in response to the advertisements. These applications were being delivered largely in person, although some came in the mail. At the end of that week into the beginning of the next week, Schupp began reviewing the accumulated files and new applications for hiring. Later in the week of June 5 the began hiring from the former employee category, and continued to do so throughout the week of June12.

On or about June 5, Schupp received a call from Bill Whitman's brother, Sandy who said that Whitman Electric would be laying off employees, and asked if Rondout needed people. Schupp said that they did, and asked him to send the names. At this point, Schupp was simultaneously reviewing incoming applications, old files, and was expecting the Whitman referrals.

On June 20, just after 9 a.m., Schupp received a fax from Bill Whitman listing 13 Whitman employees just laid off and recommended for hire. Of the 13 listed names, Schupp hired 7 of these referrals. All of these hirings were during June 1995.

During the week of June 24, Schupp began to feel confident that he had hired an adequate number of qualified employees, and that he had accumulated an adequate applicant pool. On June 26, Schupp, knowing that the receptionist had told applicants they would be hearing from him, directed letters to be sent to the outstanding applicants telling early that Rondout would keep their applications on file for 1 year, but would not be offering them employment at that time.

Schupp credibly testified as to the names of each employee hired during the May–June 1995 period, the reason for each hire, and how such hires complied fully with Rondouts usual hiring practices.

Joseph Mooney

Rondout rehired Mooney as an electrician on June 26, 1995. He was previously employed by Rondout in 1994. Mooney called Rondout seeking work. Mooney previously worked for Whitman Electric, during the time Schupp worked for Whitman. Further, he had previously worked for Rondout as a referral.

Michal Mancuso

Mancuso, a student in medical school, has always been employed by Rondout during the summers, and was rehired on June 9 as a helper, just as he had been in previous years.

Robert Valentine

Valentine was rehired as an electrician, on June 14, following a telephone discussion between he and Schupp earlier in June. Valentine previously worked for Rondout in 1992.

Wayne Heaney

Heaney is an electrician who was rehired by Rondout on June 19 after Schupp located him through the inactive file. Schupp has remembered him from having worked together with him, "hand and hand," for years.

James McElrath

McElrath ,a former Rondout employee, was also rehired as an electrician on June 19. Schupp contacted hum after receiving the inactive files and offered him a job. He previously worked for Rondout in 1992.

David Rosner

Rosner, another former Rondout employee, submitted a resume to the Company on May 17. Upon reviewing his resume, Schupp noted that he has seen his name in the inactive file. He was retired as an electrician on June 19.

Mark Vose

Rondout rehired Vose on June 19 as a electrician. He previously worked for the Company in 1993. Vose contacted the Company, on or about June 16, to say he was looking for work.

August Wiedermann

Wiedermann sent in a resume, then filled out an application on June 15. Schupp remembered his former Rondout work. In fact, Schupp had worked with him personally. Schupp rehired him as an electrician on June 19.

John Malkin

Rondout rehired Malkin as an electrician on June 21. Besides being a previous Rondout employee, his name was on the list of Whitman Electric referrals.

Albert Leonardo

Leonardo mailed in a resume and application in response to one of the ads. Schupp hired him as a former Rondout employee, to work as an electrician, on June 26. Schupp noted that Leonardo referenced Local 363 on his resume, a fact which did not interfere with his rehire.

James Walsh

Walsh filled out an application on May 16. He was previously employed by Rondout in 1991. He has worked with Schupp at Rockland for several years. Schupp offered him work as an electrician on or about May 16, but Walsh did not commence employment until June 26. There was a large time span between when he filed out the application and when he started because Walsh wanted to give his current employer ample notice, and Schupp was not going to need a lot of help until June.

John Schorschinsky

Rondout rehired Schorschinsky as a helper, on July 6th. Schorschinsky had left Rondout's apprentice program to join the Union apprentice program. However, Schorschinsky decided to leave the Local 363 program, and asked to be rehired by Rondout. He was reinstated by Schupp, notwithstanding his prior union affiliation.

Warren Belmore III

Belmore was rehired as an electrician on August 7 following receipt of two excellent references from a Rondout employee and Sandy Whitman.

Michael Sharpe

Sharpe has worked several times for Rondout. He was most recently rehired as an electrician on August 29. He had been laid off sometime after March 1995, but was recalled by Schupp because he knew he was a good worker, and the Company had an immediate need. Sharpe's 4 years' experience in the apprenticeship program of Local 215 IBEW was known to Schupp, and was no deterrent to his hire.

Thomas Alecca

Alecca was referred by Whitman. He was also recommended by two employees of Rondout. Schupp hired him as an electrician on June 16.

Gary Coon

Coon was also referred by Whitman, and was called by Schupp. He was hired as an electrician. His start date was June 22.

Edward Albright

Albright was referred by Whitman and hired by Schupp in or about June 26.

Roger Kelly

Kelly was also referred by Whitman.

Wilhelm Peters

Peters was referred by Whitman. In addition, Schupp knew him from having worked with him in the past. Peters submitted an application on June 23 and Schupp put him to work as an electrician on June 27.

Charles Pectral III

Pectral III was referred by Whitman. He was hired on July 15 as an electrician.

In addition to the Whitman and Rondout referral lists, Schupp also offered employment to individuals based on referrals from other sources, or by application.

Richard Gallina

Gallina was hired as a laborer beginning June 12. He was referred to Rondout by its employee Dennis Borne. Gallina submitted an application on May 31.

Harrison Lou

Lou submitted an application on June 5, in response to a newspaper ad, and was hired as a helper on June 12. Schupp hired him as a helper even though he had applied to be an electrician because Schupp felt that he did not have enough electrical experience to be a commercial electrician.

Robert Pomilla

Pomilla submitted an application on June14. Schupp interviewed him and hired him, based on his demeanor in the interview and his skills. Pomilla had applied as an electrician helper, however, Schupp determined that he was not qualified to be an electrician. He was hired as a helper.

William E. Miller

Miller was hired by Schupp on June 22. On the morning of June 22, Schupp received an urgent call for additional staff

from a jobsite. When Schupp walked down the stairs from his office, on his way out to the field, the receptionist told him that MIller was there filling out an application. Schupp, who needed to hire an electrician at once, agreed to speak with him. Schupp was impressed by MIller and decided to hire him immediately. Because of the convenience of Miller's unexpected presence and availability, as opposed to the delay inherent in returning to the application and files, Schupp elected to offer the work to Miller.

Adam Cooper

Cooper was referred to Rondout by two employees. Cooper had also applied for a position as an electrician. However, Schupp determined that he was not qualified as such as he was hired as a helper. He commenced work on June 27.

Earl Davis

Davis was referred to Schupp by one of the employees. Schupp interviewed him and hired him as a helper on June 27.

Roger Hill

Hill was referred to Schupp by the New York State Department of Labor. He applied on June 30. Hill wrote on his application "father is an electrician Local Union No. 3 and would like to follow footsteps of Dad." This was known to Schupp when he received Hill's application, but did not interfere with Hill's hire.

Michael Court

Court submitted an application on March 2. Schupp hired him as an electrician on July 5. Court had continued to call Schupp to ask about available work during that period and when Schupp knew he had some available, he called Court. Court also had Whitman as a reference on his application and Schupp knew his work personally from having worked together as partners. Moreover, Schupp was well aware that. Court had been a long-time member of Local 363. Nonetheless, Schupp hired him.

Gene Lane

Lane applied to Rondout on June 23. He had been referred by employee Bill MIller. However, Schupp did not rely on Miller's referral until he interviewed Lane, and based on his interview, decided to hire Lane as an electrician. Schupp decided to hire Lane on or about June 23. After deciding to hire him, Schupp misplaced his application, and did not have a phone number for him. Once he obtained Lane's phone number, he called, and hired him on July 6.

Paul Cerwonka

Cerwonka was also referred by the New York State Department. He applied on September 19 during a period when Rondout was recruiting solely for its apprenticeship program. He was hired as an apprentice specifically to participate in that program.

Matthew Suppies

Suppies was hired as a laborer on June 26. Schupp was personally familiar with his work. Suppies is a member of the Laborer's Union, a fact known to Schupp, but which did not interfere with Rondout offering him employment.

The General Counsel alleges that the 11 discriminatees who applied to Rondout and were affiliated with the Union were denied employment discriminatorily. Based on Schupp's credible testimony I conclude Rondout's determinations made with with respect to their applications were neutral as to any Local 363 affiliation. As set forth above, I have concluded that Rondout had adequate nondiscriminatory reasons to hire the individuals that it did hire. Following their hire, there were no positions available for the "alleged discriminatees." Moreover, I conclude Rondout had logical business reasons not to hire these applicants who were not offered employment. I "further" conclude those reasons were devoid of any discriminatory basis.

It appears to me that the General Counsel's only theory is that Rondout knew the 11 alleged discriminatees were union members, and that any failure to hire them must give rise to the conclusion that it was the membership in Local 363 which motivated the Company to refuse to hire them. The General Counsel submitted no evidence of any direct intention to discriminate.

Schupp credibly testified in detail why each of the alleged discriminatees was not hired.

Peter Crisci applied for work as an electrician at Rondout on June 16. Rondout Electric did not offer Crisci work because Schupp had a sufficient number of hires from among former Rondout employees. He simply had no position for Crisci. Moreover, Crisci had been out of work for a lengthy period of time, a fact Rondout considers as having a strong negative impact on the Company's assessment of an applicant's skills.

Further, Schupp had no knowledge of any union membership on the part of Crisci. Crisci's application was silent on the issue. The General Counsel told Schupp during his 611(c) examination that one of the employers listed on Crisci's application was a Local 363 employer. Schupp credibly testified that he was unaware that such employer listed by Crisci on his application was Local 363 employer.

Gregg Fratto sought employment as an electrician. Fratto's sole indication of his Local 363 background was his former employment by Perreca Electric. Schupp credibly testified that although he recognized that Perreca had a Local 363 contract, he made no assumptions about its employees as Perreca does not hire exclusively union members.

Moreover, Fratto and Crisci both applied on June 16, while Schupp was dealing primarily with Rondout rehires. The following week Schupp received and hired the referrals from Whitman Electric. Following these, the Company had no reason to offer employment to either of these individuals.

Don Krom applied for work as an electrician on June 9. Initially, Schupp considered Krom for employment, Krom was a former Rondout employer, and also had Whitman experience. Since Krom's Rondout experience listed on his application predated Ken's time, he asked a long-time Rondout project manager about Krom. The project manager noted that Krom had quit suddenly and without notice. Schupp concluded that this circumstances constituted grounds to disqualify such applicant from re-hire. Rondout therefore did not further consider Krom for employment.

Ed Barber applied for work as a foreman, on June 23. It is uncontroverted that Rondout had no openings for foremen at that time. Indeed, the advertisements, which the Company used only sought helpers and electricians. Thus Rondout did not have any opening for the position sought by the applicant.

The General Counsel argues that although Barber sought a foreman job. Rondout should have considered him for an electrician's job. I conclude there is no reason why such a burden should be placed on an employer. Moreover, Schupp credibly

testified that he would not hire an employee for a lower position when he applied for a foreman job because the jobs of electrician and foreman differ dramatically. A foreman does not work with tools, and is higher paid

Moreover, according to Barber's application, he had not worked in the field as an electrician for several years. Schupp credibly testified that in his view an electrician who does not practice for an extended period of time loses the skills, and is not deemed a qualified candidate. I conclude this is another credible reason Barber was not hired.

Another problem with Barber's application was that he crossed out his signature on the line which would indicate, inter alia, that the applicant has told the truth. Barber earlier testified that he did not want to sign the Company's at will employment provision. Schupp testified that this also contributed to his decision.

Roger Dalton an alleged discriminatee, applied for work as an electrician on June 15. He was not hired by Schupp because Schupp credibly testified that his application was incomplete. Dalton completed the application's request listing of prior employers by simply listing IBEW Local 363 rather than the employers for whom he worked. Thus he supplied no employer, references. Without such information, Rondout had nothing to assess. Schupp testified he had no time to pursue this matter, and did not try to track down his previous employers. Further, after Rondout hired those applicants it did make offers to, there was no position for which to consider Dalton. Therefore, Dalton was not offered employment.

As set forth above, Schupp credibly testified that he consider an electrician who was not practicing the profession for a substantial period of time as disqualifying the individual from employment. Rondout had three such individuals apply for work. All three were lawfully rejected.

John Sager a Local 363 official, applied for work as an electrician on June 5. His application states that he ceased to work as an electrician in 1992, when he became a full-time paid organizer for Local 363. Schupp credibly testified that such absence from the field for this length of time led him (Schupp) to determine that he was not qualified for hire. Again, such refusal to hire was academic, because after Rondout hired those applicants it did, there was no position for which to consider Sager.

Stephen Rockafellow and Russell Smith also applied for work as electricians on June 5 and 6, respectively. Rockafellow's application states that he ceased to work as an electrician in 1988, when he became a full-time paid organizer for Local 363. Smith's application similarly indicates that he withdrew from being an electrician in 1988, when he became a full-time representative of the Union. Moreover, Smith had not worked as an electrician—or even as a foreman—since 1982. Schupp credibly testified that their absence from the field for this length of time led him to determine that each individual was not qualified for hire. Again, this question is academic, because after Rondout hired those applicants it did, there was no position for which to consider either Smith or Rockafellow.

William Murphy applied for work as an electrician on June 21. Schupp has known Murphy for 15–20 years and knew he was a member of Local 363 although it was not on his application. Murphy spoke with Schupp directly on June 21. Murphy was looking for work at the Filene's job. Schupp told him he did not need someone there. Schupp gave the application little consideration because he did not need people at this particular time. In fact, the very day before, Schupp received the long list of Whitman referrals.

Schupp credibly testified it would not offer work to apprentices as helpers. Rondout participates in a New York State approved apprenticeship program. The Union likewise has an apprenticeship program. The purpose of such a program is to train individuals to become electricians. For instance, the Rondout program runs 5 years, during which apprentices work as electricians (under supervision) during the day, and attend classes at night.

Working in the field as an electrician is part of the training program itself. An apprentice, therefore, would not ordinarily seek work as a "helper." To do so would be contrary to the requirements of the apprenticeship program. Therefore, Schupp credibly testified that Rondout would not offer work to an apprentice who sought work as helper. Such practice would be "going backwards."

James McMorris and Thomas McGrath were sent by Local 363 to apply for the positions at Rondout as helpers. Each of them completed applications, which indicated that they were in their last year of apprenticeship in Local 363's program. Yet each of them applied for positions as helpers.

It is uncontroverted that apprentices who are in the last year of their program are close to being full-fledged electricians. They could not be hired as anything other than apprentices otherwise they would lose their status in the Union's program. Schupp testified reasonably that if they had been hired as helpers, it would have been a huge step backward.

Moreover, Schupp deemed employment of apprentices as helpers as inappropriate. "I don't have that time to—interview somebody that's going to be an electrician in a year to be a helper." Schupp credibly that pursuant to Rondouts practice, he did not offer them employment.

In order to establish a violation of Section 8(a)(3), the General Counsel must demonstrate that facts sufficient to support the inferences that the alleged discriminatees' protected conduct was a "motivating factor" in Rondout's decision not to offer employment to them. *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981). Specifically, in this case, it is the General Counsel's burden to prove both (1) that Rondout had knowledge of each individual's union activity, and (2) that the employer's action was the result of union animus. *Borin Packing Co.,* 208 NLRB 280 (1974). I conclude the General Counsel has factual proof to sustain such burden. The mere fact of an organizing campaign is insufficient evidence to imply an inference of union animus. *Basin Packing* 208 NLRB 280–281 (1974), and *Monmouth College*, 204 NLRB 554 (1973).

The essence of the General Counsel's case is that all applicants alleged as discriminatees were members of Local 363, that Rondout was aware of such membership and the failure to hire any of the alleged discriminatees establishes the *Wright Line* motivating factor.

In this case there was no direct evidence of Local 363 animus, nor any reasonable basis for implying such animus. The facts of this case clearly establish that every employee who was hired by Rondout was hired according to Rondouts long-established hiring policies. Moreover, such hiring practices are nondiscriminatory, but rather, in my view represent sound business policies. I conclude that the mere fact that 11 members of Local 363 applied for work at Rondout and not a single applicant was hired does not permit an inference that such fail-

ure to hire even a single Local 363 member-employer establishes such the motivating factor required by *Wright Line*. See *Wright Line*, supra at 1088. Moreover, as set forth above, in excruciating detail by Schupp's, credible testimony, and nondiscriminatory reasons were given why each alleged discriminatee was not hired.

Assuming, arguendo, that a prima facie case of discriminatory motive by Rondout was established by the record, in my opinion, the General Counsel still cannot prevail. Under *Wright Line,* where an employer asserts a legitimate and substantial business justification for its conduct, despite the alleged ill motive, the Board must regard the conduct as lawful. *Harter Equipment,* 280 NLRB 597 (1986).

In the present case, every employee who was hired, was hired under application of the Company's ordinary and lawful policies. Each employee was either a former Rondout employee, a former Whitman employee, or was employed because they filled a hiring need, and were immediately available. The Company has had a long and established policy of offering work to its own employees first, then to those of Whitman Electric.

During the time at issue, Rondout hired several helpers—all for good cause, and for unquestionably nondiscriminatory reasons. Only two of the alleged discriminatees applied for work as helpers—and since both were then electricians apprentices in the last year of their apprenticeship, they were inappropriate candidates.

Since I have concluded Rondout used its ordinary and nondiscriminatory bases for its decisions at issue, I further conclude there can be no violation of the Act found. *Dallas Morning News,* 285 NLRB 807 (1987).

CONCLUSIONS OF LAW

1. Rondout is an employee within the meaning of Section 2(2), (6), and (7) of the Act.
2. Local 363 is a labor union within the meaning of Section 2(5) of the Act.
3. Rondout has not violated Section 8(a)(1) and (3) of the Act as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The complaint is dismissed in its entirety.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.